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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,
Petitioners,

v.

ROBERT W. KELLEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment permits a court of appeals to order a school desegregation plan, in effect since 1971, to be modified so that it reflects the current racial balance of the student population of a school system in the absence of any finding that the school system has engaged in unconstitutional activity within the past decade.

2. Whether the Fourteenth Amendment bars the modification of a school desegregation plan, found by a district court to be an effective means of achieving a unitary school system, merely because it orders that school attendance zones for certain grades be drawn with the goal of assuring that each racial group constitutes at least 15% of the student body of each school.

3. Whether the Fourteenth Amendment bars the modification of a school desegregation plan, found by a district court to be an effective means of achieving a unitary school system, merely because it does not include a requirement that children in grades K-4 be bused for the purpose of achieving greater racial balance in elementary schools.

4. Whether the Fourteenth Amendment and principles of equity permit a court of appeals to reject portions of a district court's school desegregation plan absent a holding that the plan as a whole is ineffective to achieve a unitary school system, or that the district court's findings of fact are clearly erroneous, or that the district court has abused its discretion in the fashioning of an equitable remedy.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 27, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals (reprinted in the Appendix at A. 1) is reported at ____ F. 2d ____ (6th Cir. 1982). The opinion of the Court of Appeals reviews three separate District

Court opinions, *Kelley* v. *Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, 479 F. Supp. 120 (M.D. Tenn. 1979) (reprinted in the Appendix at A. 38); *Kelley* v. *Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, 492 F. Supp. 167 (M.D. Tenn. 1980) (reprinted in the Appendix at A. 62); and *Kelley* v. *Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, 511 F. Supp. 1363 (M.D. Tenn. 1981) (reprinted in the Appendix at A. 128). The unpublished opinion of the Court of Appeals entered on August 19, 1981, granting a stay of implementation of the District Court's plan is reprinted in the Appendix at A. 155. The Chambers Opinion of Justice Stevens, entered on August 20, 1981, denying the Petitioners' request for relief from the stay is reprinted at A. 157. In addition, the 1971 opinion of the District Court (unpublished) is included at A. 159. The Court of Appeals' opinion affirming the 1971 order is reported as *Kelley* v. *Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, 463 F. 2d 732 (6th Cir. 1972), *cert. denied* 409 U.S. 1001 (1972) (reprinted at A. 179).

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on July 27, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides that:

> "No state shall . . . deny to any person within its jurisdiction equal protection under the laws."

STATEMENT OF THE CASE

This case concerns the power of a district court to modify requirements of a court-ordered desegregation plan in order to achieve the creation of a unitary school system. The schools of Davidson County, Tennessee ("County") have been operating since 1971 pursuant to a system-wide desegregation plan. In 1980, the United States District Court for the Middle District of Tennessee ("District Court"), which is overseeing the implementation of that plan, determined that "after nine years of zoning and busing to achieve a desegregated system and the changes that have taken place in the community and in the attitude manifested by the School Board . . . it is possible to reevaluate the efficacy of the remedy incorporated into the 1971 order." 492 F. Supp. at 189; A. 109. The District Court subsequently determined that the 1971 plan should be modified and ordered into effect a 1981 plan, which was based on extensive findings of fact supporting the District Court's decision to use both pupil assignment and educational components. A divided Court of Appeals, with Judge Celebrezze dissenting, rejected the 1981 plan. The Court of Appeals neither held the District Court's findings of fact clearly erroneous nor challenged the District Court's holding that its plan would be an effective means of achieving a unitary school system. Furthermore, the Court of Appeals ordered its own modification of the desegregation plan by requiring that school attendance zones be redrawn to approximate the current racial balance of the school system.

A. The Implementation Of The 1971 Desegregation Plan

In 1971, the District Court ordered into effect a desegregation plan for the County, which includes the City of Nashville and its environs, based upon this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971).

Kelley v. *Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, Civil Action Nos. 2094, 2956 (M.D. Tenn. 1971); A. 159.[1] The 1971 plan excluded schools located in the outer edges of the county[2] and ordered busing of school children in the remainder of the County's schools in order to achieve a minority student population in each school of 15%-35% (based upon a system-wide black student population of 25%). The 1971 plan did not require that the School Board implement any educational programs, either remedial or intercultural, nor did it require that kindergarten classes be included within the plan. Implementation of the 1971 plan was affirmed by the United States Court of Appeals for the Sixth Circuit. *Kelley* v. *Metropolitan County Board of Education, et al.*, 463 F. 2d 732 (6th Cir. 1972), *cert. denied*, 409 U.S. 1001 (1972); A. 179.

B. Review and Modification of the 1971 Desegregation Plan

In 1978, the case was reassigned to a newly appointed district judge, Thomas A. Wiseman, Jr. The next year, Judge Wiseman held that, because of changing conditions in the County, the 1971 plan required revision. 479 F. Supp. at 122-23; A. 43-44. He ordered the School Board to submit a new plan. In 1980 and 1981, the District Court held more than forty days of hearings and considered various plans.

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[1] The original complaint was filed in this case in 1955 by a class of black parents and students, seeking injunctive relief from state-mandated segregation existing in the school system of the City of Nashville, Tennessee. In 1960, another group of plaintiffs filed a similar action against the Davidson County, Tennessee school system. In 1963, these cases were consolidated upon the merger of the City and County governments.

[2] According to the District Court, to subject these distant schools to the bus transportation required by the plan would have flown in the face of "practical considerations, common sense, and judgment. . . ."; A. 169.

Of special significance during these hearings was the testimony offered by the plaintiffs of Dr. Hugh Scott. Dr. Scott, who has held academic positions at the City University of New York and Howard University and has served as Superintendent of the public schools in the District of Columbia, attacked several assumptions underlying the proposed School Board plan, which called for system-wide busing of students in all grades. As the District Court noted, "the black plaintiffs urge upon the Court *less* busing, *more* neighborhood characteristics to the assignment plan, and the permissibility of majority black schools." 492 F. Supp. at 184; A. 98. (Emphasis in original).

Based upon evidence introduced at the hearings, the District Court determined that the 1971 plan, which focused exclusively on pupil assignment and did not include any educational programs, should be modified to reflect the following findings: (i) parental contact with the teachers of young children is important to a young child's education and such contact "could only be fostered by having the schools in such a location that the parent could frequently visit the school, talk with teachers, become personally involved, and contribute services," 511 F. Supp. at 1367; A. 136, (ii) the requirement that the minority population in each school reflect the minority population of the school district as a whole had not provided the desired educational results, 492 F. Supp. at 190-91; A. 111-13,[3] (iii) public support for the school system had decreased, 492 F. Supp. at 189-90; A. 109-12, and (iv) information before the court "strongly suggest[ed] the necessity for educational components

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[3] The District Court also noted that "[p]laintiffs assert that to contend that a black child can receive a quality education only in a white majority classroom is blatantly racist and paternalistic." 492 F. Supp. at 184; A. 97-98.

both as an essential ingredient to the remedy and also as a reinforcement to parental perception of and *support for*, the system." 492 F. Supp. at 191; A. 113. (Emphasis in original).

The Court thus determined that a unitary school system could be best achieved by a lessened emphasis on busing and greater emphasis on the use of funds to promote remedial and cultural education. The District Court ordered that (i) the School Board devise school districts for grades K-4 "of a neighborhood character [while] maximizing the opportunities for integration," 492 F. Supp. at 192-93; A. 117, (ii) children in grades 5-8 be bused with the objective of attaining "at least 15 percent of either race in the minority of each middle school," 492 F. Supp. at 193; A. 117, and (iii) financial savings from decreased transportation of students be applied to the creation of magnet schools and other new educational programs. 492 F. Supp. at 195-96; A. 122-24.

C. The Provisions of the 1981 Desegregation Plan

In 1981, the District Court approved the plan submitted by the School Board as in compliance with the Court's specific guidelines. Pursuant to the District Court's order, the School Board designed a training program to ensure that faculty and staff throughout the school system are sensitive to the special needs of black children. In addition, the School Board plan divides the student population into three age groups:

1. *Grades K-4:* The 1981 plan contains school districts for children in grades K-4 that maximize integration without recourse to busing for the purpose of racial balance. The money saved by lowered transportation costs is to be used to fund special remedial classes for schools with a majority population of minority students and to hire more teachers in order to achieve better faculty/student ratios. The plan requires the implementation of an intercultural exchange program and the

development of intercultural experiences for those schools that will be predominantly of one race. 511 F. Supp. at 1368-72; A. 140-47; 492 F. Supp. at 196-97; A. 125-26.

2. *Grades 5-8:* The plan contemplates the creation of 24 schools serving grades 5-8. Consistent with the court order, 80% of the schools would contain a population composed of at least 15% from either race by 1984. The plan includes special educational programs for middle schools, the opening of a magnet school initially serving grades 7 and 8, and the creation of courses "directed toward the recognition of cultural diversity in a pluralistic society." 511 F. Supp. at 1368-72; A. 140-47.

3. *Grades 9-12:* The plan creates ten high school attendance zones, nine of which will fall within the 15% standard set by the District Court by 1984. Like younger students, high school students will participate in multicultural educational programs. The plan also contemplates the expansion of the academic magnet school to serve grades 7-12. Magnet schools have been found to be an effective means of furthering integration efforts. 492 F. Supp. at 195; A. 122-23; 511 F. Supp. at 1369-71, 1373; A. 142-44, 149-50. Finally, the plan adds to each high school an Afro-American Studies Program, which will educate students in black history. 492 F. Supp. at 196-97; A. 122-23; 511 F. Supp. at 1370-71; A. 144.

D. *The Court of Appeals Decision*

A divided Court of Appeals rejected the 1981 desegregation plan for three reasons.[4] First, the court ordered that the plan be modified so that school attendance zones are based on the cur-

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[4] The 1981 plan has never gone into effect. While an appeal was pending in the Sixth Circuit, that court stayed implementation of the plan; A. 155, and Justice Stevens sitting as Circuit Justice, denied an application from the School Board to vacate that stay. A. 157.

rent black population of the school system (32%). Second, the court reversed the desegregation plan for the middle and high schools because the District Court required only that the school system seek to achieve the goal that each racial group constitute 15% of each school. Third, the court held that the K-4 segment of the plan was constitutionally insufficient because the District Court failed to order the mandatory busing of young school children. A. 1-26.

In a vigorous dissent, Judge Celebrezze pointed to fatal flaws in the majority's reasoning. A. 26-37 First, the court misread *Swann* to mandate that a desegregation plan be based upon the ratio of black-to-white students in the County. By contrast, Judge Celebrezze read *Swann* only to hold "that the district court *may* adopt such a ratio as part of a desegregation remedy." A. 33-34 (Emphasis in original). Second, the court failed to recognize that a district court "may use its discretion to determine the proper scope of a busing plan in a desegregation remedy." A. 35. Third, and perhaps most importantly, Judge Celebrezze charged that the majority had not applied the proper standard of review to its scrutiny of the 1981 desegregation plan. Rather than determining whether the 1981 plan, considered as a whole, would be an effective means of achieving a unitary school system, the court simply rejected those portions of the plan with which it disagreed. In so doing, the court neither held that the district court had made erroneous findings of fact nor had abused its discretion in the selection of remedies. Judge Celebrezze concluded that the majority thus disregarded the standard established by this Court for review of district court remedial plans. A. 29-32, 35-36; *see, Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 534, n.8 (1979) (findings of fact); *Milliken* v. *Bradley,* 433 U.S. 267, 281 (1977) (abuse of discretion).

REASONS FOR GRANTING THE WRIT

I.

The Court Of Appeals Ignored The Precedent Of This Court By Ordering That The 1971 Plan Be Modified To Reflect The Current Racial Makeup Of The School Population

The 1971 plan required that attendance zones be drawn to achieve a black population of between 15%-35% in each school based upon a black student population of 25%. In 1982, the Court of Appeals ordered that the attendance zones be redrawn because the black student population of the system had become 32%. A. 9-11. The court's holding was plain error and clearly inconsistent with this Court's holding in *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976).

In *Spangler,* a desegregation plan was implemented in 1970 that contained no district in which minority students formed a majority of the population. By 1974, shifts in population resulted in several schools having a majority of minority students. Although these population changes were not attributed to any segregative actions of the school board, the district court ordered that school attendance zones be redrawn so that, once again, no school would have a majority of minority students.

This Court reversed. It held that once a system-wide desegregation order has been put into effect, a federal court has no authority to require that school attendance zones be updated to reflect the new racial makeup of the schools unless the change in the racial population of those schools is attributable to new acts of racial discrimination on the part of the school board. The fact that the school system may not have become fully unitary does not mandate a different result, for, as this Court stated, "having once implemented a racially neutral attendance

pattern in order to remedy the perceived constitutional violations . . . the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." 427 U.S. at 436-37. *Spangler* thus reiterated the principle that " '[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." ' *Id.*, at 434, *quoting Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971).

The Court of Appeals patently ignored the rule of *Spangler*. In 1971, a system-wide plan for desegregation of the County's student population was put into effect. In 1972, the District court ordered the School Board to take certain additional actions, including the purchase of school buses. Since that time, the School Board has never been found to have violated the constitution in the manner in which it implemented the 1971 plan.[3] The Court of Appeals' order that the 1971 plan must be altered to reflect changes in racial population accruing over the next decade thus "appears to comtemplate the 'substantive constitutional right [to a] particular degree of racial balance or mixing' which the Court in *Swann* expressly disapproved.' " *Pasadena City Board of Education* v. *Spangler*, 427 U.S. at 434, *quoting Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. at 24 (brackets in original).

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[3] The District Court made two findings concerning events since 1972. First, the District Court found that, despite the good faith efforts of the School Board, implementation of the 1971 plan "amounts to *de jure* segregation." 479 F. Supp. at 123; A. 45. By this, the District Court meant that the exclusion of outlying areas of the County by court order from the 1971 plan had affected population movements: "[I]t appears to me that the previous Court action . . . has contributed to resegregation by the mere existence of a sheltered area; it has encouraged resegregation; and to the extent that it has, this Court is of the opinion — I don't know whether there is any case law to support it — but that is *de jure* action rather than *de facto* action."

II.

The Court Of Appeals Erroneously Held That The 1971 Plan Could Not Be Modified To Require That School Attendance Zones Be Drawn With The Goal Of Assuring That Each Racial Group Constitutes At Least 15% Of The Student Body Of Each School

In approving the 1981 plan as applied to middle and high schools, the District Court sought to ensure that each race includes at least 15% of the student body in each school. The use of this figure was suggested to the District Court by the plaintiffs, *see,* 511 F. Supp. at 1368; A. 138-39; 492 F. Supp. at 193; A. 117-18, and resulted in the establishment of attendance zones that appear to increase integration in the County's secondary schools. The District Court's modification of the pupil assignment portion of the plan creates more integrated schools for secondary students, whether measured against the definition of "integration" used in either the 1971 or the 1981 plans.[6]

R. June 26, 1979 hearings, Volume III, p. 32. The District Court did not, therefore, find that School Board action was unconstitutional nor, in light of the concomitant finding of good faith, could it have. *See, Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 413 (1977).

Second, the District Court found that the School Board's implementation of a transfer program as it affected one high school conflicted with the "spirit" of the 1971 Plan and an order issued in 1979 but did not rise to action in contempt of court. 479 F. Supp. at 129; A. 56-57. The District Court did not purport to hold that the School Board's actions were unconstitutional nor did the Court of Appeals when it recited these facts. (A. 3-4).

[6] In 1979-80, the last year for which such figures appear in the record, 42% of the junior high schools and high schools operated pursuant to the 1971 plan contained black populations within 15%-35% and 73% contained at least 15% of their student body from either race. Exhibit 152. By contrast, implementation of the 1981 plan will

Despite the fact that the 1981 plan actually improves the integration of secondary schools, the Court of Appeals reversed the pupil assignment portion of the plan for middle and high schools merely because the District Court relied upon the 15% figure as a method of modifying the 1971 Plan. The Sixth Circuit attempted to justify its holding by relying on *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971). In *Swann,* this Court approved the use of a mathematical ratio reflecting the racial population of the school system as a permissible remedial method by which to measure the degree to which individual schools are segregated. *Swann* is inapposite to this case for two reasons. First, *Swann* dealt with the means by which an *initial* desegregation plan may be drawn and not with permissible modifications to an earlier plan. *Swann* is, therefore, no authority for the proposition that a modification to a desegregation plan that increases integration is constitutionally impermissible. Second, *Swann* merely held permissible the use of a fixed racial quota as the starting point for desegregation plans — it did not command the lower courts to use such a formula regardless of the facts of the particular case before them. *See, Winston-Salem/Forsythe County Board of Education* v. *Scott,* 404 U.S. 1221, 1227-29 (1971) (Burger, C.J., in chambers). This Court has repeatedly emphasized that there is no constitutional right to attend a school reflecting the racial composition of the student population.[7]

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result by 1984 in 52% of the middle and high schools having a black population within 15%-35%, and 83% of these schools having student populations of at least 15% from either race. Court Exhibit 268. Under either method of comparison, therefore, the 1981 Plan creates more integration in the secondary schools than does the 1971 Plan.

[7] *Milliken* v. *Bradley,* 433 U.S. 267, 280 (1977); *Pasadena City Bd. of Ed.* v. *Spangler,* 427 U.S. 424, 434 (1976); *Milliken* v. *Bradley,* 418 U.S. 717, 803 (1974) (Marshall, J. dissenting); *Milliken* v. *Bradley,* 418 U.S. 717, 740-41 (1974); *Keyes* v. *School District No. 1,* 413 U.S. 189, 244-48 (1973) (Powell, J., concurring in part and dissenting in part).

Moreover, and as Judge Celebrezze noted in dissent, *see,* A. 33, n.9, the Sixth Circuit's rigid insistence upon the use of mathematical ratios conflicts with a recent decision of the Eighth Circuit. In *Liddell* v. *Board of Education of the City of St. Louis,* 667 F. 2d 643, 649 (8th Cir. 1981), *cert. denied* 451 U. S. 902 (1981), the Court approved a desegregation plan that allowed the operation of schools with black populations of 30%-50% even though the school system as a whole was 76% black. The court, in analysis strikingly similar to the District Court in this case, approved the desegregation plan because "students remaining in the predominantly black schools . . . are not left completely untouched by the new system." 667 F. 2d at 649. The Eighth Circuit emphasized that students in largely one-race schools would benefit from magnet schools and alternative programs and that "the plan requires the Board of Education to spend a substantial portion of the $22 million desegregation budget to improve the quality of education in those schools that remain all black." *Id.* Thus, the Eighth Circuit approved a desegregation plan that would run directly afoul of the decision of the Sixth Circuit in this case.

III.

The Court Of Appeals Applied An Erroneous Legal Principle When It Rejected The District Court's Modification Of The 1971 Busing Decree

The Sixth Circuit rejected the implementation of the 1981 plan for grades K-4 because it read the opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education* as requiring busing to be part of every desegregation plan unless school boards are able to establish that such busing will risk the health of children or significantly impinge on the educational process. The Sixth Circuit's interpretation of *Swann,* as well as its application of the busing "exception," is inconsistent with the reasoning of that case and is in conflict with the decision of at least one other circuit.

In *Swann*, this Court was called upon to review a district court's determination that mandatory busing was necessary in order to dismantle effectively the prior unconstitutional school system. This Court, recognizing that "[n]o rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations," 402 U.S. at 29, held that mandatory busing falls within a district court's "power to provide equitable relief." *Id.*, at 30.

The Sixth Circuit stood *Swann* on its head by reading this Court's opinion as holding that busing must be part of every desegregation plan. Correctly read, *Swann* merely stands for the proposition that "bus transportation is one of the permissible techniques in effecting school desegregation." *Drummond* v. *Acree*, 409 U.S. 1228, 1231 (1972) (Powell, J., in chambers); *see, Valley* v. *Rapides Parish School Board*, 646 F. 2d 925, 939 (5th Cir. 1981), *cert. denied* 102 S. Ct. 1430 (1982). The *Swann* opinion emphasized that, because of the inherently local nature of the decision on the use of busing, there can be "[n]o rigid guidelines" governing the permissible uses of mandatory busing. 402 U.S. at 29.[8]

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[8] The Sixth Circuit also erred in its interpretation of the so-called *Swann* exception to mandatory busing. The *Swann* Court noted that a district court may exceed its equitable powers if it orders busing "when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." *Id.*, at 30-31. The Sixth Circuit erroneously understood the *Swann* Court's admonition that school busing will not be permitted in certain circumstances to mean that busing must be ordered unless those circumstances exist. And, even aside from this incorrect articulation of the applicable legal principle, the Court of Appeals misapplied the *Swann* exception when it rejected the District Court's decision not to employ busing despite the District Court's "findings concerning the educational effects of the remedy on young school children," and its conclusion that "the entire desegregation remedy might fail in the long run if very young children were included in the busing program." A. 34-35 (Celebrezze, J., dissenting); *see*, 492 F. Supp. at 189-93; A. 108-17.

The Sixth Circuit's interpretation of *Swann* conflicts with the Fifth Circuit's understanding of the use of mandatory busing. In *Stout* v. *Jefferson County Board of Education*, 537 F. 2d 800, 801-02 (5th Cir. 1976), the court of appeals upheld a district court's decision to exempt from busing certain schools because of their geographic location. Similarly, in *Lee* v. *Macon County Board of Education*, 616 F. 2d 805, 812 (5th Cir. 1980), the Fifth Circuit held that a court "may devise a constitutional plan . . . that omits some of the earlier grades from the busing program" so long, of course, as the district court's plan is sufficient to create a unitary school system.

In so holding, the Fifth Circuit not only acted in concert with the decision in *Swann;* it also followed the earlier ruling of the Sixth Circuit in this very case. In reviewing the 1971 plan for desegregation of the Davidson County Schools, the Sixth Circuit refused to upset the district court's decision to exclude from its busing plan schools in the outer edges of the County. *See, Kelley* v. *Metropolitan County Board of Education*, 463 F. 2d at 746; *id.*, at 750-51 (McCree, J., concurring); A. 209-10; 220-21.

The Sixth Circuit's contrary holding in this case — to the effect that a district court has very limited discretion not to order busing — thus conflicts with the precedent of this Court, the Sixth Circuit's own prior ruling in this case, and the principles governing equitable discretion articulated by the Fifth Circuit.

IV.

The Court Of Appeals Decision Ignored The Standards Of Review Articulated By This Court For Review Of A Desegregation Decree

A District Court always remains free to modify a school desegregation plan. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. at 437. The measure of a plan is whether it

constitutes an effective desegregation remedy. *See, Davis* v. *Board of School Commissioners of Mobile County,* 402 U.S. 33, 37 (1971); *see, Green* v. *County School Board of New Kent County,* 391 U.S. 430, 439 (1968). This Court has recognized that the creation of an appropriate remedy requires the weighing of many factual issues and the judicious exercise of equitable discretion: "[I]n school desegregation cases, '[t]here is no universal answer to complex problems . . ., there is obviously no one plan that will do the job in every case.' " *Milliken* v. *Bradley,* 433 U.S. 267, 287 (1977) (*quoting, Green* v. *County School Board of New Kent County,* 391 U.S. at 439). Accordingly, this Court has held that the selection of a remedy lies within a district court's equitable discretion. *See, Milliken* v. *Bradley,* 433 U.S. at 281; *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. at 25. Where the District Court supports its decision on the basis of findings of fact, they are binding on an appellate court unless held to be clearly erroneous. *Dayton Board of Education* v. *Brinkman,* 443 U. S. 526, 534, n. 8 (1979).

The Sixth Circuit ignored these well-settled legal principles. Instead, the Sixth Circuit rejected enforcement of the 1981 plan on grounds that were, as we have explained, legally insufficient and without regard to the effectiveness of the desegregation plan as a whole.[9] In so doing, it ignored the rulings of this Court

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[9] The Sixth Circuit noted in passing that the 1981 plan created some attendance zones composed largely of students of one race. Although a desegregation plan that fails to integrate fully a school system is unacceptable, the mere presence of some schools with a high percentage of blacks or whites does not invalidate a plan unless the makeup of those schools is a result of discriminatory actions, *see, Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. at 26, and the plan as a whole fails to achieve the maintenance of a unitary school system. *See, Davis* v. *Board of School Commissioners of Mobile County,* 402 U.S. at 33, 37 (1971). The Sixth Circuit completely failed to engage in the inquiry that would be necessary to support the conclusion that the 1981 plan is ineffective to remedy such desegregation.

and acted in direct conflict with the holdings of at least four circuits.[10]

As Judge Celebrezze's dissent demonstrates, A. 25, 31, 33, 36, the Court of Appeals would have affirmed implementation of the 1981 plan had it applied the proper standard of review. The District court found that the 1971 remedy significantly impinged upon the students' educational process; carried with it enormous economic, educational and sociological costs; had proven ineffective in eliminating the gap between black and white achievement scores; imposed an inherently disproportionate burden on black students, provided needless and harmful disruption to a young child's education; made it impossible for young black children to receive necessary community and parental support and involvement; and was proving counterproductive in achieving racial balance in each school.[11]

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[10] The following courts of appeals have held that the "abuse of discretion" standard of review must be applied in a desegregation case. *United States* v. *Board of School Comm'rs of Indianapolis*, 637 F. 2d 1101, 1116 (7th Cir.), *cert. denied* 449 U.S. 838 (1980); *Evans* v. *Buchanan*, 582 F. 2d 750, 760 (3d Cir. 1978) (*en banc*), *cert. denied*, 446 U.S. 923 (1980); *Stout* v. *Jefferson County Board of Education*, 489 F. 2d 97, 98 (5th Cir. 1974) (*per curiam*); *Kelly* v. *Guinn*, 456 F. 2d 100, 111 (9th Cir. 1972), *cert. denied*, 419 U.S. 919 (1979). *See also*, *Arthur* v. *Nyquist*, 636 F. 2d 905, 906 (2nd Cir. 1981).

[11] The Court of Appeals held that "white flight," the decreasing percentage of white students attending the public school system, may not be considered in choosing among permissible desegregation remedies. In so holding, the Sixth Circuit directly contradicted the Fifth Circuit, which has held that "white flight" may be so considered. *See, Stout* v. *Jefferson County Board of Education*, 537 F. 2d at 802. Other circuits have held that white flight may be considered by school boards adopting voluntary desegregation plans. *See, Johnson* v. *Board of Education of Chicago*, 604 F. 2d 504, 516-17 (7th Cir. 1979), *vacated on the other grounds*, 449 U.S. 915 (1980); *Parents Ass'n of Andrew Jackson High* v. *Ambach*, 598 F. 2d 705, 719 (2nd Cir. 1979); *Higgins* v. *Board of Education of the City of Grand Rapids*, 508 F. 2d 779, 794 (6th Cir. 1974).

These findings, which were not reversed as clearly erroneous by the Court of Appeals, demonstrate that the District Court did not abuse its discretion by ruling that the 1981 plan would be a better means of eradicating the continued effect of past constitutional violations than would continued use of the 1971 plan. The 1981 plan creates more integrated schools for children in grades 5-12 than does the 1971 plan and requires special educational programs, such as black history courses and a magnet school, not included within the 1971 plan. The District Court concluded that children in grades K-4 would be best served by being kept in the same school for grades K and 1 and by being exposed to special educational programs, neither of which the 1971 plan requires. The decision, after nine years of mandatory busing of children, that funds for transportation would be better used to provide more teachers and remedial classes, *see*, 511 F. Supp. at 1368-69; A. 139-42; 492 F. Supp. at 192; A. 115, rather than to bus students is a choice among equitable remedies well within the discretion of the District Court. As Judge Celebrezze stated, "the district court made extensive factual findings, supported by the record, and grounded his decision on the risk that the entire desegregation remedy might fail in the long run if very young children were included within the busing program." A. 35.

The refusal of the Sixth Circuit to affirm the District Court's choice of equitable remedies was clear error. The Court of Ap-

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In this case, the District Court explicitly found that the "greater concern" affecting white parental support of public schools was "with the quality of education received, or perceived to be received," rather than remnants of racial prejudice. 492 F. Supp. at 190; A. 110. The educational portions of the remedy are designed, "as an essential ingredient to the remedy and also as a reinforcement to parental perception of and *support for* the system." *Id.*, at 191; A. 113 (Emphasis in original).

peals reversed the District Court only becaue it "was vaguely dissatisfied with the limited character of the remedy which the District Court had afforded plaintiffs," *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 418 (1977), although it neither reversed the District Court's findings of fact as clearly erroneous nor held that the District Court failed to implement an effective desegregation remedy.

CONCLUSION

This case presents this Court with a question of increasing national importance. As the years pass, the school desegregation decrees handed down pursuant to this Court's opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education* will come under re-examination as plaintiffs and defendants alike ask district courts to modify desegregation plans in light of changing conditions. The essence of an equity court is its ability to act flexibly in order to tailor individual orders to local conditions. *See, Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-30 (1944). District courts, which are acquainted with the activities of local government, have long been recognized to be the level of the federal judiciary that "can best peform" the task of formulating desegregation commands. *Brown* v. *Board of Education,* 349 U.S. 294, 299 (1955).

The Sixth Circuit's decision in this case is worthy of review because it misconstrues the prior decision of this Court and because it creates direct conflicts with other federal courts of appeals. Perhaps more importantly, the Sixth Circuit's opinion, if allowed to go unchallenged, will lead to confusion across the nation concerning the manner in which desegregation decrees may be modified. As Judge Celebrezze wrote in dissent, "[a] careful reading of the entire record, and my experience with the previous appeals filed in this litigation, leads me be believe that Judge Wiseman has addressed a difficult problem and is,

together with the local community, making a sincere effort to being a decree of finality to this longstanding issue." A. 36. Davidson County, and countless other communities across the nation, will be ill-served if their sincere efforts are rejected on grounds clearly contrary to this Court's precedent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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